THE "PAROL EVIDENCE" RULE.

II.

IN endeavoring to make some further contributions towards a better understanding of the "Parol Evidence" rule, what is there to say of the relation of that rule to the construction of writings?

"The construction or interpretation of written contracts," says Leake,[1] "consists in ascertaining the meaning of the parties as expressed in the terms of the writing, according to the rules of grammar, and subject to the rules of law." In this statement two or three things should be noticed, *viz.*, that no distinction is made between construction and interpretation;[2] that the process is said to be that of ascertaining the meaning of the parties, but their meaning so far only as it is expressed in the writing; and that the controlling authority is recognized of rules of language and rules of law. As regards these controlling rules and principles it has been well said: "All latitude of construction must submit to this restriction; namely, *that the words may bear the sense* which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them."[3] Obviously, this is no rule of evidence; nor does it change the real nature of the objection when courts express it by saying that "evidence is not admissible" to prove what is thus objected to.[4] There is a multitude of minor rules and canons of language and legal construction, as when it is said that "children" means legitimate children, unless the contrary is clearly made out, or that "children" *prima facie* does not include "grandchildren;" and he who has to prove a case which is governed by them must conform his proof to their requirements; but they are not, therefore, rules of evidence.

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[1] Dig. Cont. 217.

[2] Neither the common usage nor practical convenience supports a distinction, taken by Dr. Lieber in his "Legal and Political Hermeneutics" (c. 1, § 8; c. 3, § 2), between interpretation and construction.

[3] Eyre, C. B., in Gibson *v.* Minet, 1 H. Bl. p. 615 (1791); cited and applied in United States *v.* U. P. R. R. Co., 98 U. S. 86.

[4] Black *v.* Batchelder, 120 Mass. 171.

One rule of evidence, properly so-called, and only one, appears to belong to the large mass of matter included under the "parol evidence" rule, *viz.*, that you cannot, in construing a written contract, deed, will, or other like writing, use the direct extrinsic expressions of the writer's meaning evidentially; that is to say, as furnishing a basis of inference in finding out the meaning expressed by the writing. Other extrinsic facts, and even other statements of the writer, may be used evidentially in aid of construction. This sort of thing cannot. In the law of evidence there is no other special rule of exclusion than this. That you cannot use these extrinsic expressions in order to add to the writing, or enlarge or vary it, is a precept of the substantive law.

Let us trace this matter a little in the case of wills. In so far as it was true, before and after the Statute of Wills, in 1540,[1] that writing was not legally necessary to a will, no doctrine that a written expression excluded from consideration an oral one had any necessary application. Doubtless, wills were very often in writing when it was not legally necessary; and then there was a certain scope for such a doctrine.[2] The Statute of Wills, in allowing, generally, a devise of lands, required writing, but it did not require signature.[3] The Statute of Frauds (§ 5), in 1676, in the case of wills of real estate, added the requirements of signature and attesting witnesses, but as to personalty (§§ 19–23) it required no more than writing. It was not until the "Wills Act," in 1837 (Stat. Vict. c. 26, § 9), that the same formalities were necessary, in England, for all wills.

1. In 1568,[4] where a man had devised land to his nephew, and the nephew died, leaving a son, and the testator thereafter orally told the son that he should have all which the will had given his father,

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[1] Stat. 32 H. VIII. c. 1; and compare Stat. 34 and 35 H. VIII. c. 5 (1542-1543).

[2] As regards the earlier usages in the matter of putting wills in writing, see 1 Swinb. Testaments, 11, 5; 2 Black Book Adm. 71; Y. B. 20 and 21 Edw. I. 264; 1 Calendar of Wills, London Court of Husting, Introduction, pp. xliv, xlv, and *passim*. And see Y. B. 19 H. VI. 69 *b*, 15, *per* Markham, Serjeant (1441).

[3] Keilwey, 209, pl. 9 (1557–1558), where one Atkins, being called to prepare a last will for Henry Browne, took full notes, carried them home, and wrote out the will, finishing it before twelve o'clock at noon. On carrying this to Browne's house to read and deliver it to him, within half an hour after twelve, he found that the testator had died at twelve. "The clear opinion of all the justices was that this was a good will in writing, made according to the statute of the year 32 H. VIII." In like manner, today, undoubtedly, there exists a contract in writing, if the parties so arrange, without signature. (Blackburn, Sale, 1st ed., 43, 44.)

[4] Brett *v.* Rigdon, Plowd. 340.

it was held that the son took nothing. "All," said the court, "that can make the devise effectual ought to be in writing. . . . No will is within the statute but that which is in writing, which is as much as to say that all which is effectual and to the purpose must be in writing, without seeking aid of words not written." In 1587,[1] where one had left land to the heirs of the body of his eldest son, and if he die without issue, to his two daughters in fee, — on the death of the testator, the eldest son was living, and also a son of his, who was tenant in the action. The defendant's witnesses swore to declarations of the testator that the daughters were to have nothing so long as the eldest son had issue of his body; "but the court utterly rejected the matter."

In a famous case, in 1591,[2] there was a question upon a devise by Sir Thomas Cheyney, made in 1558–9, to his son Henry and the heirs of his body, remainder to Thomas Cheyney of Woodley and the heirs male of his body, on condition "that *he or they, or any of them*, shall not alien, discontinue," etc. There was a question in the Court of Wards whether this condition extended to the son of the devisor, or only applied to Sir Thomas Cheyney of Woodley and the heirs male of his body.[3] As against those claiming under Henry, the question was whether the opposing party "should be received to prove by witnesses that it was the intent and meaning of the devisor to include his son and heir within these words of the condition (he or they), . . . but Wray and Anderson, Chief Justices, on conference had with other justices, resolved that he should not be received to such averment out of the will, for the will concerning lands, etc., ought to be in writing, and the construction of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give, but it should be controlled by collateral averments out of the will."

The reader will observe the reasons here given, *viz.*, as wills of land must be in writing, so *the construction of them must be collected from the written words*, and not by any averment out of it;

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[1] Challoner *v.* Bowyer, 2 Leon. 70.

[2] The Lord Cheyney's Case, 5 Co. 68.

[3] In the statement of this case in Moore, 727, the report is more detailed, and apparently more accurate, and it helps one to understand the situation; but the decision is not given. Coke's report, for the purposes which he has in hand, appears to be substantially accurate.

i. e., by setting up any extrinsic matter, — since people should be able to understand and give advice upon wills from the written words. This is not, as in the earlier cases, conceived of as putting forward extrinsic matter which is contrary to the words of the will, or which adds to them, but as offering it in aid of construction, — in a case where a will, admitting of either application, yet does not fix upon either.

But there was more in this report. It became necessary to consider and discriminate an exceptional case. For centuries there had arisen certain familiar questions of ambiguity. In matters of record, in specialties, and in other writings, there had often been occasion to deal with the problem of a name or description equally fitting two or more persons, places, or things. The wrong man having the right name was often in trouble. He had been arrested and brought into court on an *exigent* in outlawry; or, in the case of a fine or a common recovery, be had had his land claimed by another; or he was sued on a bond given to another who had the plaintiff's name; or perhaps he himself claimed land intended to be devised to another. These situations and the like are familiar all through the Year Books.[1]

The established doctrine in such cases was that he should be held, or should recover, who was the one intended. Clearly, the instrument intended only one. Either one was adequately described if taken alone, but neither was discriminated; an infirmity in the written expression left it uncertain which was meant. This was a strait from which there was no outlet, unless you looked beyond the paper, and gave effect to extrinsic matter in aid of construction. So far, therefore, as men dreamed of interpreting records or any other writings without using extrinsic matter as a lamp to read them by, here was a situation that forever tended to undeceive them.[2]

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[1] Walter Brunne's Case, Pl. Ab. 280, col. 1 (1287); Fitz. Ab. *Feff.* 56; s. c. 47 Ed. III. 16, 29 (1373); Y. B. 11 H. VI. 13 (1432); Coteler *v.* Hall, 5 Ed. IV. (Long Quint) 40 *b* (1465); s. c. Ib. 48 *b*, 54 *b*, 74 *b*, 80 *b*, 90, 97 *b*, and Y. B. 5 Ed. IV. 6, 6; Y. B. 11 H. VII. 6, 4 (1496).

[2] It is not to be overlooked that there were other provocations in the same direction. It was clearly recognized in slander, whether written or oral, that the meaning of words may depend upon the circumstances under which they are uttered. In 1577 (The Lord Cromwell's Case, 4 Co. Rep. 11 *b*, "the first cause which the author of this book, who was of counsel with the defendant, moved in the King's Bench"), the court is reported as saying that "in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking

Coke, in his report of the Lord Cheyney's Case, after what is stated above, goes on to deal with this old, familiar case: "But if a man has two sons, both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead; or that he at the time of the will made, named his son John the younger, and the writer left out the addition of the younger; for in 47 E. 3, 16 *b*," etc., and then he cites a well-known case of two William Peynels, in 1373,[1]

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of them. . . . The defendant's counsel have done well to show the special matters by which the sense of this word (sedition) appears upon the coherence of all the words." And Coke goes on to tell his reader to note "an excellent point of learning in actions for slander, to observe the occasion and cause of speaking of them, and how it may be pleaded in the defendant's excuse," and to beware of a hasty demurrer in such cases.

In contracts, also, it was always recognized that familiar words may have different meanings in different places, so that "every bargain as to such a thing shall have relation to the custom of the country where it is made" (Keilwey, 87, 3, in the Ex. Ch. in 1505). In Baker *v.* Paine, 1 Ves., p. 459 (1750), Lord Hardwicke, in a mercantile case of sale, remarked: "All contracts of this kind depend on the usage of trade. . . . On mercantile contracts relating to insurances, etc., courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction." The development of the mercantile law by the use of special juries involved a recognition of these same ideas.

[1] In the Year Book from which Coke cites it, this case is reported substantially as follows: "William, son of Robert Peynel, brings a *Scire Facias* out of a fine levied between this Robert and others by which . . . [a manor was granted and rendered] to this same Robert, and William; and the younger son sues the issue of the eldest son *Fulthorp* [for the defendant] told how the remainder was tailed to his father . . . and Robert died, and his father entered and died seised, and he is now in as heir. *Hasty* [for the plaintiff] said that the fine was levied to the intent to give the inheritance to him, and therefore the part of the fine was delivered to him by his father Robert at the time of his death,—making protestation that he did not acknowledge that there was any such William, oldest son of Robert, or that he survived his father or was seised, for he died in Robert's lifetime. FYNCHEDEN [C. J.], This is only evidence: it cannot make an issue in law or fact, whether the fine was levied to the intent of giving the inheritance to one or the other. *Hasty* then said that the fine was levied to give the inheritance to him, — making protestation as before. *Persey* [for the defendant], The fine was levied to give the inheritance to our father."

Brooke, in giving this case (Abr. *Fines*, 28, and *Nosme*, 63), notwithstanding what is said in the report, adds to his memorandum of it: "And so see an issue on the intent; and see 12 H. VII. 6, that where a man has manors of Upper S. and lower S., and levies a fine of the manor of S., it shall be taken as that manor of the two about which they conferred and had conversation, and which the conusor intended to pass.

and discriminates such cases on the ground that they involve no "secret, invisible averment." "He who sees the will . . . ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent." If the intent be not ascertainable, the will, we are then told, is void for uncertainty, since the law makes no construction in favor of either, giving it to him whom the father intended, "and for want of proof of such intent the will . . . is void."

2. It was probably a little later than this[1] when Bacon wrote his Maxim 25 (sometimes 23), to the effect that where an ambiguity in a writing is made apparent only by what is extrinsic to the writing, you may correct it by extrinsic matter. This maxim,

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. . . The intent shall be taken; that is, the manor shall pass which the conusor intended should pass."

Fitzherbert's account of the case seems to be taken from another report. W. here figures as the son of R. H. "*Ham.* [*semble*, Hannemere]. He shall not have execution, for R. H. had a son older than you, named W., who was our father, and there was a talk between J. and R. H. that W. the oldest son should marry J.'s daughter, and the remainder be tailed to our father, the oldest, according to the purport of the fine; and thereupon the fine was levied, and then R. died, and our father entered, and died seised, and we entered as heir. *Hasty* [for the plaintiff]. The fine was levied to the intent that we should inherit, and thereupon R. H. at the time of his death delivered us a part of the fine. FYNCHEDEN [C. J.]. You shall not take issue on the intent, for the intent does not lie in averment. But if I lease land for life, remainder to one W. T. by fine, and there are two W. T.'s in the country, I say that he who first happens upon the remainder shall not keep it against the other, if he cannot prove that the remainder was tailed *to him* by his name, and that he was the same person. *Belknap.* We understand that if the remainder be tailed to W. T., and there be two W. T.'s, father and son, the father shall have it. FYNCHEDEN. He to whom the remainder is tailed shall have it, and no other." The reporter adds: "*Hasty*, because of the court's opinion, said, the remainder was tailed to us as the fine purports. Ready. *Ham.* It was tailed to our father, and not to you. Ready. *Et alii e contra.*"

It may be surmised that Brooke misconceives this case. The court seems clearly to refuse an issue upon mere intention, and puts the matter solidly on the question, so far as the pleading goes, "Who is it that *the document* calls for?" The court at that period (1373) is not troubling itself as to how the jury is going to deal with the question. Doubtless if they, or any of them, should happen to have tidings of any declarations of the writer, these would have their full natural effect in influencing the verdict. As to putting evidential matter into the pleadings, and why you should insert it there, and how, and how much,—a century and a half of curious and important discussion (5 Harv. Law Rev. 313–315) had been going on in the courts between the date of this case and the writing of Brooke's Abridgment. Long before Brooke's time, as it seems, it had come to be allowed that you could have "an averment" of intention in such a case as Peynel's; but at the date of that case it was otherwise.

[1] Not later than 1596–97. See preface to Bacon's Maxims, first published in 1629 or 1630.

like the language in Coke's report, imports that *some* inquiry into extrinsic facts is necessary. That, to be sure, is obvious enough, for wills and deeds talk about extrinsic things, and these have to be identified;[1] but it was not always remembered. The maxim appears to have been wholly Bacon's own, and it was well on towards two centuries before the profession took it up. It is likely enough that the Lord Cheyney's Case suggested it. The *intuitus* of it and the state of professional opinion to which it was addressed may be appreciated if one observes the strange pedantry of legal discussion in those days, in cases where the construction of writings was in question; *e. g.*, in the famous case of the Surrey Hospital.[2]

Bacon seems to have invented the phrases *ambiguitas latens* and *ambiguitas patens*. Quite in the way of the conceptions of that time, he says that an ambiguity which appears in the writing itself can only be cured by the writing itself; *i. e.*, by merely construing the writing, or, in some cases, — as where one who has a hundred acres gives ten acres, — by allowing the choice of any ten. He puts the case of giving land to I. D. and I. S. *et hæredibus*,[3] without saying whose heirs, and gives the language in Cheyney's Case, and adds that this sort of thing "cannot be holpen by averment," — *i. e.*, by setting up extrinsic matter to correct it; "for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed." This he is careful to make applicable to wills as well as deeds: "So if a man give land in tail, though it be by will." With this obvious and incurable ambiguity, he contrasts the latent and curable kind, such as had been discussed in Cheyney's Case; namely, the old instance of two things or persons of the same name. There, he says, since the writing is clear upon its face, and the ambiguity only appears extrinsically, you may remedy it extrinsically, and even by proving the actual intention of the writer as

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[1] "In every case the words used must be translated into things and facts by parol evidence." — HOLMES, J., in *Doherty* v. *Hill*, 144 Ma s., p. 468. As to the possible reach of such inquiries, see the remarks of Judge Cooley in 1 Cooley's Blackstone, p. xvii.

[2] Fanshawe's Case, Moore, 228 (1588), in the Exchequer of Pleas; s. c. in Exch. Chamb. (1588-1589), *sub nom.* Mariot *v.* Mascal, Anderson, 202, and *sub nom.* Mariot *v.* Pascall, 1 Leon. 159.

[3] "*Nota* that it is said by my Lord Hussey [C. J. K. B. 1481-1495] that if land be given to two *et hæredibus*, they have only an estate for life; for it is not certain to whom the inheritance is limited." — Keilwey, 108, 26. This was a commonplace. See Altham's Case, *infra*, and Mirrill *v.* Nichols, 2 Bulst. 176.

to which one he meant, since the form of the writing really does describe the thing or person intended. And then he fancifully speaks of another sort of *ambiguitas latens*, where the same person or thing is designated by different names, and allows an averment of some extrinsic matter here, such as goes to identify the person or thing, but not an averment of intention, since the intention "doth not stand with the words."

In Edward Altham's Case (8 Co., p. 155), in 1610, these distinctions are gone over again; but the word "ambiguity," patent or latent, does not occur, and there is no sign of any knowledge of Bacon's phrases. A case of equivocation in a fine is stated, and an averment of intention. "This averment out of the fine is good, . . . which well stands with the words." But (citing Year Book cases) a gift to one of the sons of J. S. who has divers, and a limitation to two *et hæredibus*, are uncertain and void by judgment of law, "and no averment *dehors* can make that good which upon consideration of the deed is apparent to be void."

Bacon's maxim was an unprofitable subtlety. In truth, the only patent ambiguity that was not, in some degree, open to explanation by extrinsic matter was one that, in the nature of things, was not capable of explanation. Anything which was capable of it might be explained, as in the case put by Wigram[1] of "a legacy to one of the children of A by her late husband B. Suppose, further," he adds, "that A has only one son by B, and that the fact was known to the testator, . . . no principle or rule of law would . . . preclude a court from acting upon the evidence of facts by which the meaning of an apparently ambiguous will would, in such a case, be reduced to certainty."[2] Ambiguities, or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done. As to the resort to direct statements of intention, in the one case of "equivocation," *viz.*, where there are more than one whom the name or description equally fits, the right to resort to these declarations in such cases

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[1] Extr. Ev. pl. 79.

[2] Compare the case put by Elphinstone (3 Jurid. Soc. Pap. 266) of a gift "to my nephew John or Thomas," where, extrinsically, it might appear that the nephew was known to the testator by both these names. And see the explicit language of Sir Thomas Plumer in Colpoys *v.* Colpoys, Jacob, p. 463 (1822), declaring that "it has never been considered an objection to the reception of the evidence of . . . circumstances that the ambiguity was patent, manifested on the face of the instrument."

in no way depends on the difference between what is patent and latent.[1]

The great *commonplace* in the discussions of the seventeenth century and the first half of the eighteenth, was the Lord Cheyney's Case. When Bacon's maxim was first brought to the general notice of the profession, — namely, I believe, about the year 1761, — it appeared no longer as a maxim relating to averments, but to evidence, and it has ever since been quoted in this sense. By this time the old conceptions had been partly cleared up and enlarged. The limitation of the discussion to averments, to the matter that you could plead, had obscured the subject.

3. It was, of course, as we have seen, always known that construction must take account of the things and persons of whom the document spoke, — that the language must be "translated" into these. This, to some extent, must have included the conditions, circumstances, and relations out of the midst of which and with reference to which the writer spoke. But the courts were shy of going far in that direction, indeed, of going at all beyond the bounds which limit the identifying process, that of ascertaining, in the simplest sense, the persons and things named in the writing.

In 1651,[2] in ejectment, it appeared upon a special verdict that one who had real estate, and also had goods and chattels worth only five pounds, gave to his wife, by will, "his whole estate, paying debts and legacies," and these debts and legacies amounted to forty pounds. It was held that the lands passed, as well as the goods, and an estate in fee simple. "Hales" (afterwards the Chief Baron and Chief Justice, Sir Matthew Hale) argued, for the plaintiff, that the intention to devise both lands and goods appeared by "the ordinary manner of speech. . . . Also the subject-matter in fact doth prove this to be his intent; and although here is not a collateral averment to prove the intention, but a collateral proof to declare the testator's intent, this may be admitted to ascertain the court of his meaning, as it is in proving an Act of Parliament. In the Lord Cheyney's Case, an averment standing with a will was accounted allowable, though an averment against a will be not," etc.

In 1702,[3] on a special verdict in ejectment,[4] the verdict set forth

[1] Doe d. Gord *v.* Needs, 2 M. & W. 129; 1 Jarm. Wills (5th Eng. ed.) 400-401. Compare Browne, Parol Ev. § 49.

[2] Kirman *v.* Johnson, Style, 293. [3] Cole *v.* Rawlinson, 1 Salk. 234.

[4] It is very noticeable how few the extrinsic facts are which one finds in the earlier special verdicts of this sort, *i. e.*, where the purpose is to supply the court with the facts needed in construing a document.

that a widow died seised of the Bell Tavern, and possessed of other leasehold estates, and her will provided, — "I give, ratify, and confirm all my estate, right, title, and interest which I now have, and all the term and terms of years which I now have or may have in my power to dispose of after my death, in whatsoever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsley." This J. B. was the son and heir of the widow's husband, but not of the widow, and he had already the remainder in tail in the Bell Tavern, after the widow; this was under a settlement of his father, who, being seised in fee of the Bell Tavern, settled it for the use of himself for life, remainder to his wife for life, remainder to his son in tail, remainder to his wife in fee. The question now was what estate John Billingsley took in the Bell Tavern under the widow's devise. A majority of the judges, Powell, Powys, and Gould, held (and it was affirmed afterwards in the Exchequer Chamber and the House of Lords) [1] that he took an estate in fee.

To us of the present time that seems equally good sense and good law. But observe the dissent and the reasoning of Chief Justice Holt, the greatest lawyer of them all. He was unwilling to admit that what appeared upon the natural interpretation of the words, taken alone, to be a life estate, should become an estate in fee by referring to the terms of the father's settlement and the legal relation of his son to the Bell Tavern established thereby:

"Holt, C. J., *contra*, for the intent of a testator will not do, unless there be sufficient words in the will to manifest that intent; neither is his intent to be collected from the circumstances of his estates, and other matters collateral and foreign to the will, but from the words and tenor of the will itself; and if we once travel into the affairs of the testator, and leave the will, we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer, he shall not know how to expound it. Upon the will 't is so, but upon the matter found in a special verdict, 't is otherwise; and what if more accidental circumstances be discovered, and be made the matter of another verdict? Men's rights will be very precarious upon such construction. And as for the honesty of the construction, what if the woman paid a good portion, and was purchaser of this reversion, is it not as honest then to construe it in favor of her heir as to expound it in favor of the right heir of the husband? But we must not depart from the will to find the meaning of it in things out of it. 'T is then a certain rule that to devise lands to H without farther

[1] See note to s. c., 2 Lord Raym. 831.

words, will pass but an estate for life, unless there be other words to show his intent, as forever, or unless he devise for some special purpose which cannot be accomplished without a larger estate; and as this is a sure rule, so it holds good as well where the devise is of a reversion as where 't is of lands in possession, unless he devise it as a reversion, or take notice of a particular estate, for then his intent may appear upon the face of the will itself; but if the words be general, and without regard to the nature of the thing, it is otherwise, for it shall not be construed from the nature of the thing, which is extrinsical, but from the words of the will. Ask a lawyer what passes: he says an estate for life, for he knew not that it was a reversion; and though it be a fruitless estate, and will signify nothing, yet that does not appear till it be found, and therefore when found 't is not to be regarded." [1]

4. But the courts of equity had begun to use a writer's intention in a much freer way. Adhering to the rule that extrinsic intention must not be used to displace or vary that of the writing, they nevertheless found many ways of using it, and even of using the direct oral expression of it. These courts, having no jury, had not before them, in listening to whatsoever evidence might help, the apprehension so often expressed by the common law judges that "it is not safe to admit a jury to try the intent of the testator." [2] It must be remembered what is meant by such an apprehension at that period. Not yet had any distinct system of rules for excluding evidence come into existence. The power of judges to set aside verdicts as being against the evidence was not yet well established. It had begun to be exercised, but had not got far. The attaint was still the regular way of controlling the jury, and this had practically lost its hold. The jury still held its old character and function, that of a body who might decide on its own knowledge alone, and, if it heard evidence, might decide against it. This power of the jury, and its exemption from any punishment for deciding against the evidence, were vindicated in Bushell's Case in 1670.[3] The Statute of Frauds, in 1676, relieved against this state of things, by requiring in a great many cases that there should be a writing,

[1] The facts of this case, and the relation of the various parties involved in it to each other, are more fully and, as it would seem, more accurately given in 3 Bro. P. C. 7, where a brief account of the arguments of counsel in the House of Lords is given, but only a bare statement of the result reached by the Lords in 1705. It appears from this report that Chief Justice Trevor, in the Exchequer Chamber, dissented from the opinion of the majority.

[2] Powell, J., in Lawrence *v.* Dodwell, 1 Lutw. 734 (1698).

[3] Vaughan, 135.

or some other specific act of formality, before an action could be brought or a claim established. This, it will be observed, had the same effect which attended a requirement of the sixteenth century and later, that in certain cases there should be two witnesses, or at least one witness; [1] it said, in effect, that it should no longer be true that the verdict of a jury was enough, whether there were witnesses or not. After the Statute of Frauds, — a very extraordinary enactment to have been passed by an English-speaking community in any age, so comprehensive is it and so far-reaching,[2] — no jury could find a contract of the sort named in § 4, unless there were a writing; or one named in § 17, unless there were either a writing or one of the facts there specified; no jury could find a devise of real estate without a signature and witnesses, as required in § 5, or a will of personalty without writing, except under circumstances indicated in §§ 19 to 23. To the most important dealings of men the Statute of Frauds gave new security. It is not probable that so wide-reaching an Act would have been passed if the only tribunal for the decision of controversies had been the judges. And in construing the statute it was entirely natural that different ideas and methods should prevail in the equity and the common law courts. "This is not," said an equity court, in 1708,[3] in considering the question of hearing oral statements of a testator's intention, "like the case of evidence to a jury, who are easily biased by it, which this court is not." In 1736 we read in Bacon's Abridgment (vol. 2, p. 309) that the rule of rejecting —

"Parol evidence . . . to control what appeared on the face of a deed or will . . . has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and to inform the conscience of the court, *viz.*, that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence."

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[1] Stats. 1 Ed. VI., c. 12, § 22 (1547); 5 & 6 Ed. VI., c. 11, § 12 (1552), requiring two witnesses in cases of treason; and 21 Jac. I., c. 27 (1623), where the mother of a bastard child who conceals its death is punished as for murder, unless she prove, "by one witness at the least," that the child was born dead. See Hale's practice under this statute, 2 Hale, Cr. Law, 289.

[2] [It] "carries its influence through the whole body of our civil jurisprudence, and is in many respects the most comprehensive, salutary, and important legislative regulation on record affecting the security of private rights." 2 Kent. Com. 494, note.

[3] Strode *v.* Russell, 3 Rep. Ch. 169. The Lord Chancellor Cowper appears to be speaking. He was assisted by the Master of the Rolls, Trevor, C. J., and Tracy, J.

In 1742, Lord Hardwicke complained of his predecessor, Cowper (1705–1710), for doing this sort of thing as regards declarations by a testator of his intention: "He went upon this ground, that it was by way of assisting his judgment, in cases extremely dark and doubtful. . . . I was never satisfied with this rule of Lord Cowper's, of admitting parol evidence in doubtful wills; besides, he went farther in the great case of Strode *v.* Russell."[1] A practice existed of recognizing a testator's extrinsic declarations of intention, consistent with the will, as regularly admissible in doubtful cases. In 1708, Lord Cowper seemed to allow this when he said,—

"Where the words stand *in æquilibrio*, and are so doubtful that they may be taken one way or the other, there it is proper to have evidence read to explain them, and we will consider how far it shall be allowed, and how far not after it is read; . . . and the distinction in Cheyney's Case well warrants the reading of evidence where the intent of the testator is doubtful, as there where a man had two sons, named John, etc., which my Lord Chancellor said differed not from this case, where the words hang in equal balance what settlement he intended."[2]

The same judge, as Lord Keeper, had held the same thing in a striking case in 1705,[3] where a bequest gave all the testator's household goods, as woollen, linen, pewter, and brass whatsoever, except a certain trunk. The writer of the will was offered to show that the testator directed him to insert all his goods, except the trunk; "and my Lord Keeper thought it might [be allowed], notwithstanding the Statute of Frauds and Perjuries, for it here neither adds to nor alters the will, but only explains which of the meanings shall be taken, as in case of a devise to son John where the testator had two of the same name."[4] And in 1750–1751,[5] Sir John Strange, Master of the Rolls, said,—

"The distinction as to admitting parol evidence I have always taken to be that in no instance it shall be admitted in contradiction to the words of the will; but if words of the will are doubtful and ambiguous, and unless some reasonable light is let in to determine that, the will will fall to the ground, anything to explain, not to contradict, the will, is always admitted. So it is in the case of having two sons of the same name," etc.

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[1] Ulrich *v.* Litchfield, 2 Atk. 372.

[2] Strode *v.* Russell, 3 Rep. Ch. 169. This was not a case of equivocation.

[3] Pendleton *v.* Grant, 1 Eq. Cas. Ab. 230, 2; s. c. 2 Vern. 517.

[4] And so Docksey *v.* Docksey, 8 Vin. Ab. 195.

[5] Hampshire *v.* Pierce, 2 Ves. 216.

It will be noticed here that the old case of two persons or things of the same name holds the place, not of an exception, but of an instance under a general principle. It figured also in some cases in a similar but more limited way, as standing for a general doctrine relating to names, that errors or uncertainties in names could be corrected by the testator's oral declarations. In 1707 a testator[1] had devised an estate, charged with the payment of a debt of £100 to one Shaw. It turned out that this sum was due, not to Shaw, but to Alice Beck, then the wife of one Fitch. The devisees refused to pay her. In a bill, apparently to enforce the payment, the plaintiff was allowed to show by the one who drew the will that the testator said that he meant the £100 which was due Mrs. Fitch, "the Lord Chancellor [Cowper] declaring he saw no hurt in admitting of collateral proof to make certain the person or the thing described."[3] In 1718,[2] where a legacy was given to Mrs. Sawyer, and there was no such person known to the testatrix, it was alleged that she meant Mrs. Swopper; and a master was directed to inquire who was meant, "and whether the testatrix meant Mrs. Swopper." So, in the well-known case of Beaumont *v.* Fell,[4] in 1723, where, under a bequest to Catherine Earnley, Gertrude Yardley was allowed to take, evidence was admitted of declarations of the testator that "he would do well for her by his will." And Lord Hardwicke, in considering a testator's declarations of his meaning, repeatedly recognized such a rule, as in 1742,[5] —

"I do not know that upon the construction of a will courts of law or equity admit parol evidence,[6] except in two cases, — first, to ascertain the person, where there are two of the same name, or else where there has been a mistake in a Christian or surname; and this upon an absolute necessity; as in Lord Cheyney's Case, where there were two sons of the name of John. . . . The second case is with regard to resulting trusts relating to personal estate, where a man makes a will and appoints an executor with a small legacy, and the next of kin claim the residue."[7]

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[1] Hodgson *v.* Hodgson, 2 Vern. 593.

[2] S. C. 1 Eq. Cas. Ab. 231. In the margin to this report it is stated that in Prec. Ch. 229, the case is given as one where the testator had given the woman's maiden name, having forgotten that of her husband. But the report in Prec. Ch. does not support this statement.

[3] Masters *v.* Masters, 1 P. Wms. 421.

[4] 2 P. Wms. 141.

[5] Ulrich *v.* Litchfield, 2 Atk. 372.

[6] Here is the familiar ambiguity in using the phrase "parol evidence" for extrinsic expressions of intention.

[7] So also in Baylis *v.* Attorney-General, 2 Atk. 239 (1741).

5. Lord Hardwicke here mentions as his second case a famous sort of instance that figured much in the books for a century and a half, from the English Revolution to the Statute 1 Wm. IV. c. 40, in the year 1830. It was the rule of English law that where a testator left personal estate undisposed of, and appointed an executor, this personage took the surplus. "At law it has been the rule from the earliest period that the whole personal estate devolves on the executor; and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially." [1] On the top of this, however, the equity courts laid down a rule of presumption or construction, that in case a gift was made to the executor by the will, this indicated a purpose not to give him the surplus; and in such a case he was held *prima facie* not entitled to it. A contrary intention might, indeed, be apparent from the whole will; but if it were not, then it might be extrinsically proved by the declarations of the testator. Such declarations, it will be observed, supported the *prima facie* right of an executor, and were only received "to rebut the equity." Although when these declarations were received they might be met by others in a contrary sense, yet no declarations were directly and in the first instance receivable to contradict the right of the executor.[2] Nor where the construction of the will was plain, against the executor, as in the case, at least in modern times, where the gift was, in terms, for his care and trouble, was it permitted to introduce extrinsic declarations of intention.[3] This matter, for the most part, as I said, came to an end in 1830 by the Statute 1 Wm. IV. c. 40. The doctrine, before that, having been that "the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take," [4] now, the statute changed the fundamental rule as to an executor's *prima facie* right, and made him primarily a trustee of the residue for the next of kin, "unless it shall appear *by the will or any codicil thereto*" that he "was intended to take . . . beneficially." It will be observed that not merely did it change the fundamental rule, but it expressly required that the intention to give to the executor beneficially should appear by the writing.[5]

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[1] 2 Williams, Executors, *1327 (5th Am. ed.).

[2] Lady Osborne *v.* Villiers, 2 Eq. Cas. Ab. 416, 12; Cloyne *v.* Young, 2 Ves. 95.

[3] Langham *v.* Sanford, 17 Ves. 435 (1811).

[4] Sir William Grant in Pratt *v.* Sladden, 14 Ves. p. 197 (1807).

[5] Williams *v.* Arkle, L. R. 7 H. L. 606; compare Love *v.* Gaze, 8 Beav. 472.

Under this general head of "rebutting an equity" may be brought all the other cases of a resulting trust, the presumption against double portions, and the like. It has been stated as a general principle that where "the document is of such a nature that the court will presume that it was executed with any other than its apparent intention," the apparent intention may be shown to be the real one.[1] In such cases the testator's extrinsic declarations of his purpose are not admitted as adding to the document, or varying or contradicting it; nor are they received as evidence in aid of interpretation. They come in as an incident to the "equity," as a ground of relief against the operation of an equitable rule which refused its usual construction to the document. "In such case" (rebutting a resulting trust), says Jarman,[2] "it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but against a mere equity arising by implication of law."

6. In the course of the discussion that went on in the courts of equity, during the eighteenth century, over the admissibility of "parol evidence," — meaning thereby extrinsic declarations or other direct evidence of intention, — the conception had been clearly brought to light of using these and all other extrinsic matters merely as evidence to aid in the process of interpretation, as contrasted with grounding upon them a substantive right or defence. In Goodinge *v.* Goodinge,[3] in 1749, where there was a legacy to such of a man's nearest relations, as his executors "should think poor and objects of charity," "evidence was then offered of the testator's having poor relations in Salop, and that he knew thereof; to which was objected the rule by Holt, C. J., in Cole *v.* Rawlinson,[4] that the intention of the testator is not to be collected from collateral and foreign circumstances. Lord Chancellor [Hardwicke]: That rule is laid down much too large by Holt; for in several cases it is admitted that it must be allowed, *viz.*, where the description or thing is uncertain (not only where two of the same name), it must be admitted to show that the testator knew such a person, and used to call her by a nickname. Although parol evidence cannot be read to prove instructions of the testator, after the will

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[1] Steph. Dig. Ev. Art. 91. See also 1 Jarm. Wills (5th Eng. ed.) 390–392; Reynolds *v.* Robinson, 82 N. Y. 103.

[2] Wills (5th ed.), 391. [3] 1 Ves. 231. [4] *Ante*, p. 425.

is reduced into writing, or declarations whom he meant by the written words of the will, yet that is different from reading it to prove that the testator knew he had such relations, to establish which fact it may be read, but not to go any farther. And though this is a nice distinction, yet it is a distinction in the reason of the thing." About a year later, in Hampshire *v.* Pierce,[1] in construing a gift by will "to the four children of my late cousin Elizabeth Bamfield," it appeared that she had six children, two by a former husband, Poddlecomb, and four by a later one, Bamfield. The Master of the Rolls, Sir John Strange, in dealing with an argument that the word "four" should be rejected, and a counter offer to show the extrinsic declarations of the testatrix, said: —

"As there is some uncertainty, I have admitted the going into evidence to explain the intent of the testatrix in the expression 'the four.' . . . . The testatrix declared . . . . that she had provided for Mrs. Bamfield's four children. . . . . She also puts a negative on the other two; . . . . so that taking this on the face of the will, in which also the circumstances of the family must be taken altogether, it appears clearly that the four children by the second husband were those meant to share the £100."

It is fairly plain that in these cases we have got to the idea, not merely of construing the will by reference to the facts and circumstances of the case, as contrasted with that strict and mere inspection of the text of which people sometimes talked, but to the conception of using even the testator's extrinsic declarations as evidence to assist in giving to the text its right meaning. If the Master of the Rolls, in 1750, might think it possible, logically, to help himself out of an uncertainty in such a way as this, why should it not generally be so used in any like case? Well, evidently it would be highly dangerous to do it, even for a court of equity, and merely "to inform the conscience" of the judge. And when you come to the jury of a common law court, it would be dangerous in the extreme. But, for all that, it should be carefully borne in mind that in the nature of things this evidence might often help, merely as evidence, in putting a construction on the text. It was not a denial of this, which under the new aspect of the subject, still, and with greater rigor, kept out these extrinsic declarations of intention; for in the stock case of equivocation, where it was let in, the courts were content to think that they used these declara-

[1] 2 Ves. 216.

tions in a merely evidential way. "The intention," said Lord Abinger, for the Court of Exchequer, in 1839,[1] "shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction." And the judges, where they cannot receive it, sometimes recognize its probative force. "If the direct evidence of intention," said Lord Selborne, in Charter *v.* Charter,[2] "which has been offered by the respondent, independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty." [3]

7. As regards all other extrinsic matter which might help in construing a document, used merely as lights to read it by, the courts by the middle of the eighteenth century had in a good degree escaped from the bondage of the earlier days. While it was true that allowing extrinsic matter thus to be brought into view and used, did make it impossible for any man to construe a fine, a deed, or a will by merely reading it over and dealing with it grammatically, yet it was more and more evident that such a thing was never literally possible, and that the enlargement of the field of view, like a thousand other enlargements, although it might be dangerous, was necessary.

One relic of the old notions remained, and still haunts our cases. It was said that so long as a document is susceptible of a clear and certain interpretation upon the face of it, there must be no resort to anything extrinsic; as if it were ever possible unless in the rarest cases, to tell whether such an interpretation is allowable, without looking beyond the paper. The influence of this idea is seen in a leading and liberal case, Fonnereau *v.* Poyntz,[4]

[1] Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 363. In 1833, in Richardson *v.* Watson, 4 B. & Ad., p. 799, Parke, J., said that in such cases the "evidence is admissible to show which manor was intended to pass, and which son was intended to take. Such evidence is admissible to show, . . . not what the testator intended, but what he understood to be signified by the words he used in the will." And three years later, in Doe d. Gord *v.* Needs, 2 M. & W. 129, the same judge, now Baron Parke, said, "The evidence . . . has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects, . . . and to determine which of the two the devisor understood to be signified by the description." Wigram in his Extr. Ev., pl. 152, says, "Perhaps the . . . explanation is that the evidence only determines what subject was known to the testator by the name or other description he used."

[2] L. R. 7 H. L. 364.

[3] Upon this point see the very valuable papers of Hawkins and Nichols in 2 Jurid. Soc. Papers, cited below.

[4] 1 Br. C. C. 472.

in 1785, where it was a question whether a testatrix had given to certain persons a gross sum of £500, and other amounts, or only an annuity. The will showed that she also meant to provide for some other persons, while the state of her property, if it could be looked at, indicated that she could not have meant to give annual payments of such large amounts. Lord Thurlow, at first, was of opinion that the meaning of the will, read by itself, was so clear for the annuity that he could not look at the extrinsic facts; but afterwards he persuaded himself that it was sufficiently doubtful to allow him to examine these facts, — not, as he was studious to explain, to control bequests that were distinctly made, or in respect to a subject accurately described, but to explain matter that was doubtful upon the mere construction of the words of the will, taken as a whole.

This theory, more or less definitely expressed, is found in many cases.[1] The court, in such cases, seems to conceive that it is practicable to divide the extrinsic facts, to look at such of them as identify the persons and things apparently referred to, and then stopping there, to decide whether there be a "latent ambiguity." According as one is discovered or not, they then admit evidence of further extrinsic facts to clear it up, or reject this evidence altogether. Such seems to be the method in the minds of Chief Baron Kelly and Baron Martin in Grant *v.* Grant.[2] It is what the court puts forward in Kurtz *v.* Hibner,[3] where a testator, owning only one eighty-acre tract in a certain township, had called it section thirty-two by mistake, when it really was section thirty-three. In holding that the true section did not pass by the will, the court says; "There is no ambiguity in this case, as is urged. When we look at the will, it is all plain and clear. It is only the proof *aliunde* which creates any doubt, and such proof we hold to be inadmissible."[4] But this method is now justly discredited. Wigram's book, in 1831, gave it a death-blow. The sound and simple principle is that

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[1] *E. g.*, in Brys *v.* Williams, 3 Sim. 573.

[2] L. R. 5 C. P. 727.

[3] 55 Ill. 514.

[4] The true view of such a case appears to be that there is no question of ambiguity in the matter, there is a mistake; and the question is whether the will, taken as a whole, admits of a construction which will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are receivable, and then the inquiry is whether, in view of all these facts, anything passes. And so it was held in Patch *v.* White, 117 U. S. 210, where, however, a sound opinion is hurt by joining in a resort to the maxim about ambiguity. Compare Newburgh *v.* Newburgh, Sugden, Law of Property, 367; s. c. 5. Madd. 364; Thayer's Cases on Evidence, 847, 931–933.

which is excellently illustrated by Mr. Justice Bradley, in dealing with a contract of insurance, in Reed *v.* Insurance Co., in the Supreme Court of the United States;[1] by the Lord Chancellor Cairns, in Charter *v.* Charter;[2] and by Mr. Justice Blackburn, in Grant *v.* Grant[3] and Allgood *v.* Blake.[4] "There is a class of evidence," said Lord Cairns, in Charter *v.* Charter, "which in this case, as in all cases of testamentary dispositions, is clearly receivable. The court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied."[5]

8. As to Bacon's maxim, every one knows how much it has figured in the modern cases. But, at first, it seems to have lain for more than a century and a half unnoticed by the profession. So far as I have observed, it comes first to light, as a part of our legal literature, in 1761, in a little anonymous book, "The Theory of Evidence," apparently written by Bathurst, then a Justice of the Common Pleas, and afterwards Lord Chancellor Apsley, the uncle of Buller. This work became afterwards part six of what we know as Buller's "Nisi Prius," a book which was originally published anonymously, before Buller could have written it, and which, in its first edition, was sometimes called "Bathurst on Trials." In a slight attempt, to give shape to the rules of evidence, it was said, in the "Theory of Evidence," that "the fifth general rule is, *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur;*" and this was accompanied by further quotations from Bacon, and by a few modern instances as late as 1751.[6] There is no indication that the writer, in thus exhuming Bacon's sixteenth century exposition, was aware how he was mingling old conceptions with new and very different ones. He produced it now as a rule of evidence, and not of pleading. The

[1] 95 U. S. 23 (1870).
[2] L. R. 7 H. L. 364 (1874).
[3] L. R. 5 C. P. 727 (1870).
[4] L. R. 8 Ex. 160 (1863).
[5] See Nichols, Extr. Ev., 2 Jurid. Soc. Pap. 374, 375.
[6] There was, perhaps, a touch of the maxim in Jones *v.* Newman, 1 W. Bl. 60, in 1750, where there were two John Cluers, and the trial judge had refused the offer to prove by parol evidence that the testatrix intended to leave it to John Cluer the son. In granting a new trial the court is reported as saying, "The objection arose from parol evidence, and ought to have been encountered by the same."

great name of the author of the maxim gave it credit. It seemed to offer valuable help towards settling the troublesome question as to how far you could go in looking at outside facts to aid in construing a written text. To say that a difficulty which was revealed by outside facts could be cured by looking further into such facts, had a reasonable sound; and when it was coupled with a rule that you could not in any way remedy a difficulty which was apparent on the face of the paper, there seemed to be a complete pocket precept covering the whole subject. When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon. The maxim caught the fancy of the profession, and figured as the chief commonplace of the subject for many years. It still performs a great and confusing function in our legal discussions. But Wigram,[1] seventy years after it was thus brought newly to light, abandoned the use of it, and showed how uninstructive it is; and the lesson has been abundantly repeated since.

Bacon, when he spoke of ambiguities patent and latent, meant only a limited sort of thing, *viz.*, what he said, *ambiguity*. But now his maxim, which was unfortunately treated as covering the entire subject, was made to apply to all sorts of defects. It could only do duty as a general exposition by being strangely misinterpreted and strangely misapplied, *e.g.*, to the question of filling a blank which a testator had left in his will, or, as we have seen, to the correction of an error, where one thing was expressed, and another meant. If *any* error of expression was apparent on the face of the document, this was called patent ambiguity, and the courts sometimes undertook to reconcile the correction of it with the maxim which forbade this. The maxim had another singular operation: it was sometimes admitted that defects and errors were not ambiguities, and *therefore*, it was said, they are incurable, as when the dissenting opinion in Patch *v.* White[2] says: "If there is any proposition settled in the law of wills it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be necessary to explain a latent ambiguity; and a mere mistake is not a latent ambiguity. Where there is no latent ambiguity, there no extrinsic evidence can be received." It became common to say that the first effort must be to disclose the existence of a

[1] Extrins. Ev. His preface is dated 1st January, 1831.

[2] 117 U. S., p. 224.

latent ambiguity by extrinsic evidence; and then, according as this was successful or not, more extrinsic evidence was or was not receivable. In like manner, in a case where the true objection was that the words of a contract would not bear the construction sought to be placed upon them, and therefore there was no place for evidence, the court strangely resorted to the maxim: "No rule," it was said, "is more familiar and well-settled than that which decides that the terms of a written contract, not presenting a case of latent ambiguity, are not to be varied by extrinsic and parol evidence."[1]

9. Wigram's valuable little book, in 1831, went far to clear up the confusion that had gathered over the subject. He was led to write it, as he says in the Advertisement to the first edition, by being accidentally present at the hearing of the case of Goblet *v.* Beechey, before Vice-Chancellor Leach, in July, 1826, — a case of which he gives some account in an appendix. This book lacks a historical exposition of the subject, and it does not clearly discriminate those parts of it which belong to the law of evidence from the rest. The cases, also, are not so thoroughly analyzed, or treated with so free a hand, as might be wished. Owing, furthermore, to the use of an "interpretation clause" near the beginning (pp. 9 and 10), and to the use of the phrase of "evidence to prove intention" in a special sense, his meaning is often misconceived.

But the book brings out and stamps upon the mind of careful readers two or three things of capital importance: 1. That Bacon's maxim is inadequate and uninstructive; 2. That extrinsic expressions of the writer's intention cannot be resorted to in aid of the exposition of a will, except where a person or thing is described in terms equally applicable to two or more; and 3, that there is no excluding rule of evidence peculiar to this subject, except that which rejects extrinsic evidence "to prove intention itself as an independent fact." The seven propositions which are the substance of the book amount to this: A testator, unless the text, read as a whole, shows the contrary, presumably uses words in their primary sense. If the extrinsic facts of the case allow of the words having this sense, they must have it. If they do not, the words must have such other secondary sense as they are capable of, in view of these facts. If the words are obscure, or unintelligible to the court, resort may be had, in deciphering or translating them, to

[1] Black *v.* Batchelder, 120 Mass. 171 (1876).

the aid of competent witnesses. As regards persons and things indicated by the testator, and as regards "every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words," a court may look at every extrinsic fact which is not excluded by the general rules of evidence, with one single exception. There is one excluding rule of evidence, namely, that not even to save a will from being void for uncertainty can "evidence to prove intention itself" be received, unless in the case of equivocation; namely, where a person or thing is described in terms applicable, equally, to more than one.

Wigram did not exhaust the subject. The valuable discussions of Hawkins and Nichols[1] are enough to show that Wigram's exposition is imperfect, and open to criticism as regards what is covered by the excluding rule of evidence. He puts it that actual intention cannot be used at all in evidence, in order to determine the meaning of the document, and therefore (allowing only for the well-known exception) that all evidence of "intention as an independent fact" is inadmissible, whether it be direct expressions or other extrinsic matter. But, in fact, a great deal of the evidence which is on all hands conceded to be admissible, such as the relations of affection, or the contrary, between the testator and a person named, and his habits or mode of speech, tends strongly to show his intention. Probably it is neither practicable nor desirable to shut out the natural operation of such evidence, or to make the excluding rule cover anything more than that peculiarly dangerous kind of evidence of intention, the writer's extrinsic expressions. That is the thing, as we see, which has for centuries been prominently discussed, and which is alone named in the great exception to this rule, *viz.*, the case where there are two of the same name. To this effect are the best modern cases;[2] and

[1] 2 Juridical Soc. Papers, "On the Principles of Legal Interpretation, with Reference especially to the Interpretation of Wills." By F. Vaughan Hawkins, Esq. (May 21, 1860), pp. 298–330; "On the Rules which ought to govern the Admission of Extrinsic Evidence in the Interpretation of Wills," by Francis Morgan Nichols, Esq. (Dec. 3, 1860), pp. 351–384.

[2] *E. g.*, "Parol evidence of statements of the testator," Lord Cairns in Charter *v.* Charter, L. R., 7 H. L. 364. "Direct evidence of intention, . . . independently of the light thrown by extrinsic facts," Lord Selborne, *ibid.* "There is but one case in which *this sort of evidence of intention* can properly be admitted," etc., Lord Abinger, for the court, in Hiscocks *v.* Hiscocks, 5 M. & W. 363. "Declarations of the testator, or other direct evidence of intention," 1 Jarman on Wills (5 Eng. ed.), 401.

such is the tendency of the excellent papers, above referred to, of Hawkins and Nichols.[1] Of course, some conduct, such as a gesture, is merely tantamount to a verbal expression of intention, and comes under the same rule. Of course, also, where bare intention is not really evidential, the exclusion of it needs no explanation.

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[1] See also Hawkins, Constr. Wills, *9: "Parol evidence to show what were actual testamentary intentions of the testator (such as the instructions given for the will, memoranda, or declarations by the testator as to what he had done or meant to do by his will, etc.) is admissible only to determine which of several persons or things was intended under an equivocal description.